No. 83-1437

In the Supreme Court of the United States

OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI AND LAWRENCE RHODE, PETITIONERS

v.

ALFRED W. CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Rule 68 of the Federal Rules of Civil Procedure provides that, if a plaintiff rejects a pre-trial offer of judgment and then obtains a less favorable final judgment, the plaintiff "must pay the costs incurred after the making of the offer." The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, provides that in certain enumerated actions the court may award the prevailing party "a reasonable attorney's fee as part of the costs." Against this background, the United States will address the following question:

Whether a plaintiff who rejects a Rule 68 offer of judgment that is more favorable to the plaintiff than the judgment finally obtained may shift to the defendant, under 42 U.S.C. (Supp. V) 1988, the attorneys' fees incurred by the plaintiff after the making of the defendant's more favorable offer of judgment.

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INTEREST OF THE UNITED STATES

This case presents the important question whether attorneys' fees, which are statutorily defined as "part of the costs" in The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, are among the "costs" encompassed by Rule 68 of the Federal Rules of Civil Procedure for purposes of determining a plaintiff's liability for his own attorneys' fees when the plaintiff rejects an offer of judgment under Rule 68 but later obtains a final judgment less favorable than the offer. The issue arises because, under Rule 68, such a plaintiff is liable for "the costs incurred" after the offer is made.

The United States has a substantial interest in the resolution of this issue. The decision of the court below, holding that civil rights plaintiffs may recover post-offer attorneys' fees even if the final judgment they obtain is less favorable than the Rule 68 offer they rejected, significantly impairs the effectiveness of Rule 68 as a tool for encouraging settlements and avoiding protracted litigation. Accordingly, the decision may well result in an

unnecessary increase in the workload of the already overburdened federal courts. In addition, as a defendant, the United States may face potential liability for attorneys' fees under a host of fee-shifting statutes (most notably, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k)) that, like Section 1988, specifically define attorneys' fees "as part of the costs."

The United States makes regular use of Rule 68 generally and in civil rights litigation in particular. Civil rights cases are expensive to take to trial; they may involve many witnesses and thousands of documents. See *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983), slip op. 11-12. At the same time, the realistic value of the claims asserted is often relatively small, notwithstanding the frequent inclusion of rather extravagant claims for relief. In appropriate cases, therefore, the United States makes a reasonable offer of judgment. Such offers are made not only to avoid needless litigation but also to ensure that the government will not be required to pay the plaintiff's attorneys' fees (which often far exceed the plaintiff's damages) if the plaintiff prevails on some aspect of his claim. Incorporation of Section 1988's definition of "costs" into Rule 68 (which does not itself define "costs") would serve the important purpose of relieving defendants of the burden of plaintiffs' attorneys' fees for continued litigation that produces no additional benefits. But if plaintiffs are assured that they will recover attorneys' fees even if they reject reasonable offers and ultimately obtain less favorable judgments, there will be very little incentive for plaintiffs to accept reasonable settlement offers. Accordingly, the United States joins petitioners in urging reversal of the decision below.

SUMMARY OF ARGUMENT

Notwithstanding Section 1988's definition of attorneys' fees as "part of the costs," the court of appeals held that a civil rights plaintiff who obtains a less favorable final judgment than the Rule 68 offer he rejects is entitled to recover his post-offer attorneys' fees from the defendant. The facts of this case vividly demonstrate the anomalous result that flows from such a ruling. Petitioners made an obviously reasonable offer of judgment to settle this case for $100,000, which would have compensated respondent for his pre-offer attorneys' fees of $32,000 and $68,000 in damages. Respondent rejected that offer and then ran up additional attorneys' fees of $171,000 to secure a jury verdict of $60,000—a net *loss* to respondent of $8,000. To require petitioners to pay $171,000 in post-offer fees incurred solely because of respondent's unreasonable failure to accept a favorable settlement is contrary to elementary principles of fairness.

The law does not require such an inequitable result. The court of appeals' decision conflicts with the plain meaning of Rule 68 and Section 1988 and rests on erroneous policy considerations. Rule 68 and Section 1988 can be easily harmonized to produce a result that is faithful to the purposes of the statute and the rule and fair to both parties.

I. Because Rule 68 does not define "costs," it is appropriate to look to Congress's definition of that term in the underlying statute. Section 1988 expressly includes attorneys' fees as "part of the costs." Thus, although the traditional understanding of "costs" might not ordinarily include attorneys' fees, here Congress has exercised its unquestioned authority to define fees as costs, and that determination is binding on the courts. See, *e.g.*, *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 449 n.7 (1982); *Hutto* v. *Finney*, 437 U.S. 678, 693-697 (1978).

Moreover, the plain language of Section 1988 is no accident. Contrary to the court of appeals' assumption, the contemporaneous understanding of the term "costs" at the time of Rule 68's promulgation in 1938 clearly included attorneys' fees. By 1938, Congress had enacted numerous statutes—encompassing much of the major legislation of the period—that defined attorneys' fees "as

part of the costs," and it has continued to do so with ever-increasing frequency. See App., *infra*, 1a-6a. The substantial number of statutes affected, coupled with the rule that courts must defer to Congress's definition of costs and attorneys' fees, compels a reading of Rule 68 and Section 1988 that harmonizes the language of each.

II. Although the court of appeals acknowledged that a plain meaning analysis would be "logical" (Pet. App. A8), it rejected that approach based on its understanding of the policies behind Section 1988 and its view that the Rules Enabling Act, 28 U.S.C. 2072, prohibits interpreting Rule 68 costs as encompassing attorneys' fees under Section 1988. The court erred in both respects.

A. Holding a plaintiff responsible for his own post-offer attorneys' fees does not "cut[] against the grain of section 1988" (Pet. App. A8). While it is undoubtedly true that the primary purpose of Section 1988 was to encourage the bringing of meritorious civil rights actions, Congress never intended Section 1988 to override all competing policies. Rather, fee awards under Section 1988 must be "reasonable." Here, respondent seeks to charge petitioners with $171,000 in post-offer attorneys' fees for work that produced no additional benefits; on the contrary, that work resulted in a jury verdict $8,000 less than petitioners' offer. In these circumstances, it would be "unreasonable," and thus contrary to Section 1988, to reward respondent for his mistake in judgment.

In addition, the lower court's decision is inconsistent with this Court's approach to Section 1988 as set forth in *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983). There, the Court stressed that the amount of fees recoverable under Section 1988 depends, to a very large extent, on the degree of success obtained. It is quite obvious that a plaintiff who rejects a reasonable offer of judgment and then obtains a less favorable final judgment has not achieved any success whatsoever attributable to his post-offer efforts, and it would be contrary to the teaching of *Hensley* to reward such a plaintiff with his post-offer attorneys' fees.

Congress's concern with imposing reasonable limits on fee awards under Section 1988 demonstrates that there is ample room for harmonizing the policies of that Section with other provisions of law, including Rule 68. Rule 68 was intended to encourage settlements and thereby avoid unnecessary litigation; it also incorporates elementary principles of fairness to defendants, who should not be saddled with a plaintiff's unnecessary litigation expenses. Indeed, the goals of Rule 68 and Section 1988 are virtually identical—to create an incentive structure that will encourage meritorious and discourage pointless litigation. The court of appeals thus erred in elevating its single-minded perception of Section 1988's purposes over the more balanced approach intended by Congress.

B. Concluding that the "right" to attorneys' fees under Section 1988 is "substantive," the court below also held that an interpretation of Rule 68 costs that includes attorneys' fees would run afoul of the Rules Enabling Act, 28 U.S.C. 2072, which provides that the federal rules may not alter any "substantive right." The court rested its conclusion on the substance/procedure dichotomy originally formulated by this Court in diversity cases, in the immediate wake of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). See, *e.g.*, *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941). Even in diversity cases, however, the Court long ago abandoned that approach as a test for determining the validity of a federal rule. See, *e.g.*, *Hanna* v. *Plumer*, 380 U.S. 460, 469-474 (1965). And the test has *never* been applied in non-diversity cases such as this one, where the concern is not displacement of state substantive law, but rather the allocation of authority between Congress and this Court. Thus, the only relevant inquiries are whether the Constitution permits Congress to delegate to the Court authority to promulgate the particular rule in question (an issue not here in dispute), and, if so, whether Congress has exercised its authority to supersede the rule promulgated by the Court.

The federal rules have the force of statutes, there is a strong presumption in favor of their validity, and there is no indication whatsoever, much less the necessary clear evidence, that Congress intended an implied, partial repeal of Rule 68 when it enacted Section 1988. Thus, the Rules Enabling Act presents no obstacle to the ordinary operation of Rule 68 in this case.

ARGUMENT

A PLAINTIFF WHO REJECTS A RULE 68 OFFER OF JUDGMENT AND THEN OBTAINS A LESS FAVORABLE FINAL JUDGMENT MAY NOT SHIFT HIS POST-OFFER ATTORNEYS' FEES TO THE DEFENDANT UNDER 42 U.S.C. (SUPP. V) 1988

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. (Supp. V) 1988, provides that in certain enumerated actions the court may award the prevailing party "a reasonable attorney's fee *as part of the costs*" (emphasis added). Rule 68 of the Federal Rules of Civil Procedure provides that, if a plaintiff rejects a pre-trial offer of judgment and then obtains a less favorable final judgment, the plaintiff "must pay the costs incurred after the making of the offer." The issue in this case is whether such a plaintiff may rely on Section 1988 to shift his own post-offer attorneys' fees to the defendant. In our submission, fee-shifting in these circumstances is barred by elementary principles of statutory construction as well as by sound reasons of policy.

I. Settled Principles Of Statutory Construction Require That The Definition Of Attorneys' Fees "As Part Of The Costs" In 42 U.S.C. (Supp. V) 1988 Be Harmonized With The Language Of Fed. R. Civ. P. 68

A. Neither the language nor the history of Rule 68 defines "costs." [1] Accordingly, one must look elsewhere

[1] The Advisory Committee responsible for the original Federal Rules of Civil Procedure limited its entire explanation of Rule 68 to a citation to three state statutes, 2 Minn. Stat. § 9323 (Mason

to ascertain the items encompassed by the term "costs" as it is used in the rule. Ordinarily, it might be proper to look to the traditional understanding of costs. But when Congress has specified a particular meaning for "costs," Congress's definition must control. See *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 449 n.7 (1982) (emphasis added) ("*Unless so defined by statute*, attorney's fees are not generally considered 'costs' * * *."); *Hutto* v. *Finney*, 437 U.S. 678, 693-697 (1978) (Congress may amend definition of costs to include attorneys' fees and have it apply to all litigants); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 772 (1980) (Burger, C.J., dissenting); cf. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) (Congress, not the courts, determines when and how attorneys' fees shall be awarded).[2] It follows that

1927); 4 Mont. Code Ann. § 9770 (1935); N.Y. C.P.A. § 177 (1937). Neither these statutes nor the practice under them aid in determining the meaning of "costs" in Rule 68. Cf., *e.g.*, *Watkins* v. *W.E. Neiler Co.*, 135 Minn. 343, 160 N.W. 864 (1917); *Morris-Turner Live Stock Co.* v. *Director Gen. of Railroads*, 266 F. 600 (D. Mont. 1920); *Margulis* v. *Solomon & Berck Co.*, 223 A.D. 634, 229 N.Y.S. 157 (1928). Rule 68 elicited virtually no discussion in the debates of the Advisory Committee. See ABA, *Rules of Civil Procedure for the District Courts of the United States* 337-338 (1938). The history of the 1946 and 1966 amendments to Rule 68 is similarly unenlightening. See Fed. R. Civ. P. 68 advisory committee note, 28 U.S.C. App. at 637.

[2] Notwithstanding the court of appeals' apparently contrary conclusion (see Pet. App. A11), this is all that *Roadway Express*, *supra*, actually held. In *Roadway Express*, the issue was whether the "costs" to be imposed on an attorney under 28 U.S.C. 1927 should include attorneys' fees because the action was brought under Title VII, the attorneys' fee provision of which defines fees "as part of the costs" (42 U.S.C. 2000e-5(k)). The Court ruled that "costs" in 28 U.S.C. 1927 should be read to track the definition of "costs" in 28 U.S.C. 1920 (which does not include attorneys' fees) because Congress enacted the two statutes together in 1853 as part of one, comprehensive legislative package. 447 U.S. at 757, 759-760. Rule 68, on the other hand, is not part of an integrated statute or rule provision that defines "costs." Instead, as Justice

when the action involves a statute that, like Section 1988, authorizes the award of attorneys' fees "as part of the costs," Rule 68 costs must include any attorneys' fees that might be awarded under the statute. Rule 68 thus requires that respondent bear that portion of his own attorneys' fees incurred after the making of petitioners' offer of judgment.[3]

Such a straightforward, "plain language" construction of the interplay between Rule 68 and attorneys' fee statutes has been widely accepted. See, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362-363 (1981) (Powell, J., concurring); *Fulps* v. *City of Springfield*, 715 F.2d 1088, 1091-1095 (6th Cir. 1983); *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110, 113-117 (N.D. Cal.

Powell has noted, "[i]n approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation. Cf. Fed. Rule Civ. Proc. 54(d)." *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 364 n.2 (1981) (Powell, J., concurring).

[3] Because Rule 68 is concerned only with liability for costs incurred after the making of the offer, respondent's entitlement to his pre-offer attorneys' fees of $32,000 is not at issue in this case. Moreover, the district court held (Pet. App. B10) that petitioners were not entitled to recover their post-offer costs, including attorneys' fees, from respondent, and petitioners have not challenged that ruling. Thus, this case does not present any issue concerning the circumstances in which a defendant might seek to collect his post-offer costs from the plaintiff.

In any event, reading "costs" in Rule 68 to include Section 1988 attorneys' fees does not have the result, suggested in Justice Rehnquist's dissenting opinion in *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 378 (1981), of requiring civil rights plaintiffs who reject Rule 68 offers also to absorb the *defendant's* attorneys' fees as costs. *Delta Air Lines* held that Rule 68 is entirely inapplicable when judgment is rendered in favor of the defendant. Thus, in any case to which Rule 68 applies, the defendant will by definition have lost the case. Section 1988, on the other hand, provides that fees may be awarded only to the prevailing party. Thus, the condition that entitles the defendant to be considered for the benefits of Rule 68 is the same condition that precludes him from taking advantage of Section 1988.

1979); *Scheriff* v. *Beck*, 452 F. Supp. 1254, 1259-1260 (D. Colo. 1978); cf. *Roadway Express*, 447 U.S. at 771-772 (Burger, C.J., dissenting) (same reasoning applied to "costs" in 28 U.S.C. 1927). Indeed, even the court below described this approach to the operation of Rule 68 as "logical" (Pet. App. A8), but it based its decision instead on its understanding of policy considerations extraneous to the statutory language. In so doing, the court ignored well-established principles of statutory construction, as well as logic, that support reading "costs" in Rule 68 to include attorneys' fees authorized by statutes defining those fees "as part of the costs."

Statutes should be construed so as to avoid making any word meaningless or superfluous. *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *Fulps*, 715 F.2d at 1093 & n.4 (citing cases). Moreover, statutory language is to be given its plain and ordinary meaning. *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975); *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 465 (1968). The meaning of the phrase describing attorneys' fees "as part of the costs" is obvious. It means that attorneys' fees are to be treated like all other costs of litigation, to be granted if other costs are granted and to be denied if other costs are denied. Rule 68 denies costs incurred after the making of an offer more generous than the judgment finally obtained. The plain language of Section 1988 makes attorneys' fees a part of those costs.

When it drafted Section 1988, Congress, of course, simply could have authorized the recovery of attorneys' fees. But Congress chose to go further and characterize the fees as costs. In *Hutto* v. *Finney*, 437 U.S. at 693-697, this Court recognized that Congress's choice of language was deliberate.[4] While we do not contend that

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[4] In *Hutto*, the Court held that Congress may redefine costs to include attorneys' fees without running afoul of the Eleventh Amendment. Congress surely knew that costs "have traditionally been awarded without regard for the States' Eleventh Amendment immunity" (437 U.S. at 695). Thus, by defining attorneys' fees

Congress chose this language specifically envisioning its effect in conjunction with Rule 68, we do contend, as this Court held in *Hutto*, that Congress's decision to "impose[] attorney's fees 'as part of the costs'" (*id.* at 695), was not simple inadvertence. That being the case, this Court should give the language of Section 1988 its ordinary meaning.

B. There is a still more compelling reason for this Court to read Section 1988's authorization for attorneys' fee awards "as part of the costs" to mean exactly that. Congress has enacted numerous statutes authorizing attorneys' fee awards for parties litigating certain claims in federal court. The vast majority of these statutes direct that such fees as are awarded should be assessed as costs. See Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 898-899. See also Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 94th Cong., 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976: Source Book* 303-313 (Comm.

"as part of the costs," Congress was safeguarding its intent that states be held liable for attorneys' fees in civil rights litigation. See S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. 7 & n.14 (1976). In upholding that intent, this Court held that "[j]ust as a federal court may treat a State like any other litigant when it assesses costs, *so also may Congress amend its definition of taxable costs and have the amended class of costs apply to the States*" (437 U.S. at 696 (emphasis added)). And, in concluding that "[t]here is ample precedent for Congress' decision to authorize an award of attorney's fees *as an item of costs*" (*id.* at 697 (emphasis added)), the Court emphasized the limited nature of its holding in a footnote: "Thus we do not suggest that our analysis would be the same *if Congress were to expand the concept of costs beyond the traditional category of litigation expenses*" (*id.* at 697 n.27 (emphasis added)). The Court thus explicitly recognized that Congress deliberately and intentionally categorized attorneys' fees under Section 1988 as an item of costs. See also *Roadway Express*, 447 U.S. at 772 (Burger, C.J., dissenting). The issue then becomes whether there is some compelling reason for the Court to ignore traditional canons of statutory construction so as *not* to give effect to this deliberate choice of language by Congress. We submit there is none.

Print 1976) (compiling 90 federal attorneys' fee statutes). In an appendix to this brief, we have listed the 141 federal attorneys' fee statutes that our research has uncovered. App., *infra*, 1a-9a. Of these, 91—including many of our most important legislative enactments[5]—describe attorneys' fees as part of the costs of litigation. With so many, and so many important, pieces of legislation involved, this Court should not ignore the effect of any of the statutory language and should adopt the "*specific and explicit provisions* for the allowance of attorneys' fees" made by Congress. *Alyeska*, 421 U.S. at 260 (emphasis added).

Indeed, the main point of this Court's decision in *Alyeska* was its recognition that Congress has *not* extended "any roving authority to the Judiciary to allow counsel fees *as costs or otherwise* whenever the courts might deem them warranted" (421 U.S. at 260 (emphasis added)). Rather, "the circumstances under which attorneys' fees are to be awarded *and the range of discretion of the courts in making those awards* are matters for Congress to determine" (*id.* at 262 (emphasis added)). The proper interpretation is one that relies on the language Congress has chosen (*id.* at 269):

> Since the approach taken by Congress to this issue has been to carve out specific exceptions * * * courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees * * * or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts'

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[5] Among the statutes authorizing attorneys' fee awards as costs of litigation are Title VII, 42 U.S.C. 2000e-5(k); the Copyright Act, 17 U.S.C. 505; the Railway Labor Act, 45 U.S.C. 153; the Communications Act, 47 U.S.C. 206, 407; the Interstate Commerce Act, 49 U.S.C. 8, 16, 908; the Clayton (Anti-Trust) Act, 15 U.S.C. 15; the Securities Act of 1933, 15 U.S.C. 77k(e); the Trust Indenture Act of 1939, 15 U.S.C. 77ooo(e); and the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78r(a).

assessment of the importance of the public policies involved in particular cases.

Yet this is precisely what was done by the court below in refusing to give effect to the language of Section 1988 making attorneys' fees "part of the costs." [6]

C. Notwithstanding the clear interplay between the plain language of Rule 68 and the plain language of Section 1988, the court of appeals concluded that there is no reason to suppose that "costs" in Rule 68 was meant to include attorneys' fees. Pet. App. A4-A5, A9-A11. The court of appeals assumed that awards of attorneys' fees were "uncommon" in 1938, when Rule 68 was promulgated. Pet. App. A4. This assumption is similar to the approach taken by the dissent in *Delta Air Lines*, 450 U.S. at 377 (Rehnquist, J., dissenting), which stressed the importance of looking to the "contemporaneous understanding" of the term "costs" at the time of Rule 68's promulgation. The dissent assumed that "the 'contemporaneous understanding' of 'costs' when the Federal Rules of Civil Procedure were promulgated in 1938 did not include attorneys' fees any more than it did in 1813 when the predecessor to § 1927 was enacted." *Delta Air Lines*, 450 U.S. at 377 (Rehnquist, J., dissenting).

Additional research reveals, however, that this assumption is probably incorrect. Between 1813 and 1938, Congress itself began the practice of awarding attorneys'

[6] The rule established in *Alyeska* also is sufficient answer to the objection that our interpretation of Rule 68 and Section 1988 would create a two-tiered system of cost-shifting under Rule 68 depending upon the language of the statute authorizing attorneys' fees. See *Delta Air Lines*, 450 U.S. at 378 (Rehnquist, J., dissenting); *Roadway Express*, 447 U.S. at 762-763. If this is the result, it is a result compelled by Congress's choice of language and a matter for Congress to correct if it chooses. Indeed, Section 1988 itself is Congress's response to the two-tiered system for awarding attorneys' fees created by this Court's *Alyeska* decision. See S. Rep. 94-1011, 94th Cong., 2d Sess. 1-2 (1976); page 15, *infra*.

fees as part of the costs. By the time Rule 68 was promulgated in 1938, Congress had on numerous occasions defined the term "costs" to include attorneys' fees. See App., *infra*, 1a-3a, 6a. Moreover, it appears that the great majority of statutes enacted prior to 1938 that authorized attorneys' fee awards did so as part of the costs.[7] Furthermore, these statutes constituted much of the major legislation of the period: the Clayton (Anti-Trust) Act, 15 U.S.C. 15; the Securities Act of 1933, 15 U.S.C. 77k(e); the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78r(a); the Interstate Commerce Act, 49 U.S.C. 8, 16, 908; the Railway Labor Act, 45 U.S.C. 153; and the Copyright Act of 1909, 17 U.S.C. 505 (formerly codified at 17 U.S.C. 40).[8]

Congress must be presumed to have had knowledge of these provisions when Rule 68 was promulgated in 1938. Indeed, given the number and prominence of the relevant statutes, this presumption is not merely a legal fiction; it is difficult to believe that Congress was unaware of the terms of so many enactments. Thus, by 1938, the contemporaneous understanding of costs was clearly quite different than it had been in 1813,[9] and there is no basis

[7] The appendix shows that of the 25 statutes currently in force that authorize attorneys' fee awards and that were in force at the time Rule 68 was promulgated, 19 describe attorneys' fees as part of the costs. App., *infra*, 1a-3a, 6a-8a. The numbers may well have been larger in the past, for the appendix does not include statutes that were enacted and in force around 1938 but subsequently have been repealed.

[8] The legislative alterations in the traditional definition of "costs" to include attorneys' fees did not go unnoticed in the literature either. See, *e.g.*, Goodhart, *Costs*, 38 Yale L.J. 849, 878 (1929) (footnotes omitted) ("[A] number of recent federal and state statutes include provisions giving substantial costs to the successful party. Thus the Clayton Act allows * * * reasonable attorney's fees * * *.").

[9] The Court itself has acknowledged the effect of these statutes on the traditional understanding of "costs." In *Hutto*, 437 U.S. at 697 n.27 (emphasis added), the Court recognized that including

for concluding that Congress had in mind a fixed definition of costs that excluded attorneys' fees. This history, in conjunction with the mandate of *Alyeska*, the great number of statutes affected, and the policy considerations discussed below, all counsel the Court to read both Rule 68 and Section 1988 according to their plain meaning.

II. The Court Of Appeals Erred In Rejecting The "Logical" Approach To Harmonizing Rule 68 And Section 1988

The court of appeals acknowledged that the construction of Rule 68 for which we have argued above is "logical" (Pet. App. A8), but it then proceeded to discard logic in favor of a misguided policy analysis and an obsolete and inappropriate approach to the Rules Enabling Act, 28 U.S.C. 2072. As we demonstrate below, the court erred in both respects.

A. The Policies Underlying Both Section 1988 And Rule 68 Require Limiting A Plaintiff's Attorneys' Fee Award To Fees Incurred Before The Making Of The Defendant's Offer Of Judgment

1. Contrary to the court of appeals' conclusion, holding a plaintiff responsible for his own post-offer attorneys' fees does not "cut[] against the grain of section 1988" (Pet. App. A8). Rather, construing "costs" under Rule 68 as encompassing attorneys' fees under Section 1988 is fully consistent with congressional intent in enacting Section 1988 and, indeed, is the only result that harmonizes that intent with the clear and important purposes underlying the promulgation and congressional consideration of Rule 68. See *Delta Air Lines*, 450 U.S. at 364 (Powell, J., concurring). There is no support for concluding, as did the court of appeals, that in enacting Section 1988 Congress impliedly intended to curtail the ordinary application of Rule 68. In operation, the two

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attorneys' fees in costs did not "expand the concept of costs beyond the *traditional category of litigation expenses.*"

provisions need not come into conflict. It is possible to award attorneys' fees within the terms of Section 1988 while limiting such fees, as is required by Rule 68, to those incurred before an offer of judgment. And while the legislative history of Section 1988 is silent with respect to Rule 68 specifically, it is quite clear that Congress did not think it was establishing an unqualified right to attorneys' fees when it enacted Section 1988.[10]

Congress provided for an award of "a reasonable attorney's fee as part of the costs" in Section 1988 in response to this Court's rejection in *Alyeska* of the "private attorney general" rationale that had been employed by some lower courts as a basis for attorneys' fee awards in litigation deemed to further the public interest. S. Rep. 94-1011, 94th Cong., 2d Sess. 1-2 (1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. 1-3 (1976). Undoubtedly, as the court below noted, the primary purpose of Section 1988 is to encourage the bringing of meritorious civil rights actions in order to utilize fully "private attorneys general" in securing compliance with civil rights laws. See Pet. App. A8. But Section 1988 is not an unqualified, single-minded provision intended to override any contrary policies that stand in its way.[11]

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[10] This silence concerning Rule 68 in the legislative history of Section 1988 takes on some significance when one remembers that Rule 68 has been part of the Federal Rules of Civil Procedure since 1938 and that statutes taxing attorneys' fees "as part of the costs" have been in existence even longer. See pages 12-13 & note 7, *supra*.

[11] On several recent occasions, this Court has rejected similar arguments for subordinating other rules of law to the goal of enforcing the civil rights laws. For example, in *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 156-159 (1982), the Court held that a private Title VII plaintiff seeking to maintain a class action must comply with the requirements of Fed. R. Civ. P. 23. Similarly, the Court refused to find that Congress implicitly intended to exempt civil rights cases from the ordinary operation, under 28 U.S.C. 1738, of res judicata, *Migra* v. *Warren City School Dist. Bd. of Educ.*, No. 82-738 (Jan. 23, 1984), slip op. 4-9; *Kremer* v. *Chemical*

Rather, fee awards under Section 1988 must be "reasonable." [12] The debates over passage of Section 1988 reflect Congress's concern that the bill could induce plaintiffs and plaintiffs' attorneys to pursue marginal or frivolous litigation. During the House hearings on the bill that was ultimately enacted as Section 1988, Representative Seiberling noted that the bill "certainly [was] not calculated to promote the interests of lawyers who make the wrong judgment or who make an ineffective presentation or who are on the wrong side of a lawsuit * * *." *Awarding of Attorneys' Fees: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 8 (1975). See also, *e.g.*, 122 Cong. Rec. 31473, 31474, 31830 (1976) (statements of Sen. Allen); 122 Cong. Rec. 31832 (1976) (remarks

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Constr. Corp., 456 U.S. 461 (1982), and of collateral estoppel, *Allen* v. *McCurry*, 449 U.S. 90, 97-99 (1980). In these cases, the Court held that plaintiffs seeking to vindicate the public policy of civil rights enforcement must suffer the same consequences as any other plaintiff when their own conduct in a lawsuit is such as to invoke well-established rules reflecting concerns of judicial economy and fairness to defendants. It is difficult to see why the result should be any different with respect to Rule 68's policy of encouraging settlement of marginal lawsuits. See *Delta Air Lines*, 450 U.S. at 352, 356, 359 n.24; *id.* at 363 (Powell, J., concurring); *id.* at 380 (Rehnquist, J., dissenting).

[12] The court of appeals avoided the limitations established in the statute and the legislative history by relying on a passage from the Senate Report stating that private attorneys general " 'should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose" (Pet. App. A8 (quoting S. Rep. 94-1011, *supra*, at 5)). This language, however, is irrelevant to the issue before the Court. There is no question here of respondent's having to pay petitioners' counsel fees; the only question is whether respondent's post-offer fees should be borne by petitioners. See page 8 note 3, *supra*.

of Sen. Abourezk); 122 Cong. Rec. 31834 (1976) (remarks of Sen. Helms).[13]

This legislative history should be considered not in the abstract, but against the factual background of this case, in which respondent seeks to charge petitioners $171,000 in post-offer attorneys' fees for work that did not produce any additional benefits; instead, the post-offer fees were incurred to produce a jury verdict that was $8,000 less than petitioners' offer.[14] Given these results, it is "unreasonable," and thus contrary to Section 1988, to reward respondent's attorneys with $171,000 in post-offer fees. As the court stated in *Waters* v. *Heublein, Inc.*, 485 F. Supp. at 114, there is "little reason to reward

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[13] Cf. Note, Delta Air Lines, Inc. v. August: *The Agony of Victory and the Thrill of Defeat*, 35 Ark. L. Rev. 604, 631 (1982). In fact, even in cases in which there is no clear rule governing the allocation of costs, no fee award is appropriate when "special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See also S. Rep. 94-1011, *supra*, at 4 (adopting *Piggie Park* standard); H.R. Rep. 94-1558, *supra*, at 6 (same). Among the special circumstances for denying attorneys' fees is the maintenance of suit "vexatiously." *Piggie Park*, 390 U.S. at 402 n.4. As this Court has recognized, "Rule 68 is an outgrowth of the equitable practice of denying costs to a plaintiff 'when he sues vexatiously after refusing an offer of settlement.'" *Delta Air Lines*, 450 U.S. at 356 (footnote omitted). Congress's intentions with respect to Section 1988 and Rule 68 thus mesh quite neatly. See pages 18-21, *infra*.

[14] Although the offer of judgment in this case was for "a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS" (J.A. 17), the courts below never suggested that the form of the offer was invalid by virtue of setting a ceiling on attorneys' fees. Cf. *Delta Air Lines*, 450 U.S. at 365-366 (Powell, J., concurring). Since Rule 68 certainly was not intended to preclude parties from agreeing on the amount of attorneys' fees (*id.* at 365 n.4)—and probably would be unworkable for defendants if so construed (see Pet. App. A3-A4)—we do not think it is of any consequence that the parties in this case stipulated to the amount of respondent's pre-offer fees after trial rather than at the time the offer was made.

[an] attorney for the post-offer work necessitated by a mistaken judgment that failed to obtain any additional benefits."

As the legislative history discussed above makes clear, no such unreasonable result is required to effectuate the policies of Section 1988. Rather, Congress left ample room for Section 1988 to be intermeshed with other provisions of law reflecting equally important policies involved in the judicial enforcement of rights.[15] Fed. R. Civ. P. 1 provides that the federal rules "shall be construed to secure the just, speedy, and inexpensive determination of every [civil] action." Rule 68, whose purpose was ignored by the court below, encourages settlements and thereby avoids unnecessarily protracted litigation by providing a realistic deterrent that compels offerees to consider seriously good faith offers of judgment. *Delta Air Lines*, 450 U.S. at 352 & n.8, 363 (Powell, J., concurring); *id.* at 379-380 (Rehnquist, J., dissenting); Fed. R. Civ. P. 68 advisory committee note, 28 U.S.C. App. at 637; 12 C. Wright & A. Miller, *Federal Practice and Procedure* § 3001, at 56 (1973). There can be no dispute over the importance and desirability of this goal. As Justice Powell explained in a similar context in his concurring opinion in *Delta Air Lines*, 450 U.S. at 363-364 (footnote and citation omitted):

> Title VII's fee provision [identical to Section 1988] was designed to enable plaintiffs to vindicate their rights through litigation. * * * On the other hand, parties to litigation and the public as a whole have an interest—often an overriding one—in settlement

[15] The House Report explains that Congress rejected the option of making awards of attorneys' fees mandatory for any prevailing party and instead deliberately chose "the more moderate approach" of leaving awards to the discretion of the courts in order to prevent abuses by plaintiffs and their lawyers. H.R. Rep. 94-1558, *supra*, at 5-6, 8; see also 122 Cong. Rec. 31832 (1976) (remarks of Sen. Abourezk). Rule 68 is simply another measure that aims to achieve precisely this same goal.

> rather than exhaustion of protracted court proceedings. Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits. The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature.
>
> * * * It therefore seems clear that the relevant interests—of both parties and the public—will be served by construing Title VII and Rule 68 in accordance with their plain language.

This is no less true with respect to Section 1988. The purpose of Rule 68 dictates a construction that will operate, to the greatest extent possible, to provide a realistic deterrent to continued litigation so that offerees will seriously consider good faith offers of judgment.[16] This is especially true in actions such as this one, in which respondent persisted in pressing a claim for $3,500,000 in damages—a claim that bore no relationship to a realistic evaluation of the value of the case, ultimately de-

[16] As a reason for refusing to apply Rule 68 to this case, the court of appeals observed that lawyers would "have to think very hard" before rejecting an offer, even if they initially considered it inadequate, because they would know that a mistake could cost them a lot of money (Pet. App. A8). Such increased consideration is the precise purpose of Rule 68, and serious thought about a serious offer should not be rejected as harmful.

The court also expressed concern that a Rule 68 offer of judgment made immediately after the filing of the complaint might deter a plaintiff's lawyers from conducting any discovery (Pet. App. A8-A9). The court's fears seem exaggerated. Before filing suit, a plaintiff's lawyers should have sufficient information to permit evaluation of an early offer of judgment.

In any event, the fact that an offer may be made before discovery is not all that significant. True, discovery may reveal information that strengthens a plaintiff's case, but it may also destroy it. There is no particular reason to think that discovery is of more benefit to one side than to the other.

termined by a jury to be $60,000. Congress's intent to facilitate the bringing of meritorious civil rights cases, manifested in the enactment of Section 1988, certainly does not mean that Congress also intended to promote full-blown litigation of every such claim even in the face of reasonable settlement offers. See S. Rep. 94-1011, *supra*, at 5 ("[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."). This Court likewise has recognized the desirability of settling civil rights claims. See *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance [are] * * * the preferred means" for achieving compliance with Title VII).

In addition to ignoring Rule 68's goal of promoting settlements, the court of appeals failed to consider the equities from a defendant's perspective. As this Court has recognized, Rule 68 incorporates elementary principles of fairness (*Delta Air Lines*, 450 U.S. at 356):

> If a plaintiff chooses to reject a reasonable offer, then it is fair that he not be allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered.

Although the Court in *Delta Air Lines* did not address itself to attorneys' fees, the equitable considerations are at least as strong in the case of fees as in the case of more traditional "costs." That is particularly the case here, where respondent's rejection of petitioners' reasonable offer of judgment led to the expenditure of an additional $171,000. Respondent was of course free to gamble that he would do better before a jury than by accepting petitioners' offer, but it is hardly fair to expect petitioners to bankroll the exercise of respondent's mistaken judgment.

In sum, the court of appeals went astray in its analysis of the relevant policy considerations. As Justice Powell observed in his concurring opinion in *Delta Air Lines*, 450 U.S. at 363-364, the goals of Rule 68 and civil rights fee-shifting statutes can be easily harmonized. Indeed, those goals are virtually identical: to create an incentive structure that will lead to the optimal level of litigation, encouraging meritorious and discouraging pointless litigation. It is thoroughly appropriate, therefore, to read Rule 68 and Section 1988 together.

2. The court of appeals' policy analysis also is inconsistent with this Court's approach to Section 1988 as set forth in *Hensley* v. *Eckerhart*, No. 81-1244 (May 16, 1983). In examining the reasonableness of attorneys' fees awarded under Section 1988, the Court in *Hensley* held that the amount of fees recoverable is dependent, to a very large extent, on the degree of success obtained. Slip op. 9-12. "[E]xcellent results" ordinarily should result in the award of a fully compensatory fee, but "partial or limited success" may well mandate a reduction in the fee award. Slip op. 11.

Generally, as the Court recognized, "[t]here is no precise rule or formula" for determining reasonable attorneys' fees under Section 1988. *Hensley*, slip op. 12. In the instant case, however, a well-established rule having the force of a statute (see *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 13 (1941)) prescribes precisely, by a procedure equitable to the parties and beneficial to the judicial system, the equation for ensuring that the amount of fees awarded to a prevailing plaintiff bears a reasonable relationship to the degree of success achieved. Under Rule 68, a party who prevails but obtains a final judgment less favorable than a previous offer of judgment receives an award of attorneys' fees for his counsel's pre-offer work; this ensures compensation for all work that produced the offer. Work done after rejection of the offer, on the other hand, produced no additional benefits, and the offeree should not be permitted to recover his

fees from the offeror who has made a reasonable effort to end the litigation before additional costs are incurred. This result is fully consistent with *Hensley*, which clearly establishes that Section 1988 does not authorize fee awards for unproductive work. Slip op. 9. See also *Smith* v. *Robinson*, No. 82-2120 (July 5, 1984), slip op. 13 ("Due regard must be paid, not only to the fact that a plaintiff 'prevailed,' but also to the relationship between the claims on which effort was expended and the ultimate relief obtained."); *Vocca* v. *Playboy Hotel of Chicago, Inc.*, 686 F.2d 605, 607-608 (7th Cir. 1982) (no fees awarded because plaintiff refused to accept reasonable settlement); *Copeland* v. *Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (no fee award for nonproductive time).

B. Construing "Costs" Under Rule 68 As Encompassing Attorneys' Fees Under Section 1988 Does Not Render Rule 68 Invalid Under The Rules Enabling Act

The court of appeals also held that its interpretation of Rule 68 was required by the Rules Enabling Act, 28 U.S.C. 2072. That Act, which delegates authority to this Court to make rules governing the "practice and procedure" of the federal courts, provides, in pertinent part, that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." In a short, enigmatic discussion, the court of appeals reasoned that the right to attorneys' fees created by Section 1988 is more "procedural" then "substantive" in some senses, more "substantive" than "procedural" in other senses, and both "substantive" and "procedural" in reality before finally concluding that "[f]or present purposes it is substantive." Pet. App. A9. The right established in Section 1988 is a "substantive" one, according to the court of appeals, because rather than "mak[ing] the litigation process more accurate and efficient for both parties * * * it is designed instead to achieve a substantive objective—compliance with the civil rights laws." Pet. App. A9. Thus, the court concluded that the Rules Enabling Act requires the imposition of a limitation on the ordinary operation of Rule 68 in order to avoid interference with the "substantive right" to attorneys' fees. The court's analysis misconstrues the meaning of the Rules Enabling Act, the status of the rules promulgated pursuant thereto, and the proper construction of the rules in the light of other federal statutes.

The validity of any particular application of a federal rule turns on a proper understanding of the meaning of the phrase "substantive right" as employed in the Rules Enabling Act. The lower court interpreted "substantive" in Section 2072 in contradistinction to "procedural." This is the result of that court's misinterpretation of a series of decisions in which this Court relied on the substance/procedure dichotomy. See, *e.g.*, *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438 (1946); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941). See generally, Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 718-738 (1974). All of these cases were diversity suits in which the issue was whether the federal rule altered a state law. The Court's concern with protecting state substantive law from encroachment by the federal judiciary—whether in the guise of judicially created federal common-law or judicial exercises of delegated authority from Congress—was apparent.[17] In *Sibbach*, for example, the Court concluded that Section 2072 was to be interpreted under *Erie's* substance/procedure rubric because Congress "has never essayed to declare the substantive *state* law, or to abolish or nullify a right recognized by the substantive law of the *state* * * * .

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[17] The Rules Enabling Act was passed in 1934, but the first rules were not promulgated until 1938, the same year that the Court decided *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). The first case in which the Court was called upon to interpret Section 2072—*Sibbach*—arose a scant three years later.

On the contrary it has enacted that the state law shall be the rule of decision in the federal courts" (312 U.S. at 10 (emphasis added; footnote omitted)). See also *Ragan*, 337 U.S. at 533-534 (Fed. R. Civ. P. 3, which tolls statutes of limitations upon the filing of the complaint in nondiversity suits, cannot be so applied in diversity suits because "the principle of *Erie R. Co.* v. *Tompkins*" demands that state law be applied).

Whether or not it is appropriate in diversity cases to construe Section 2072 in light of the substance/procedure dichotomy deriving from *Erie*,[18] it is manifestly clear

[18] The Court has subsequently repudiated the use of *Erie's* substance/procedure dichotomy even in the diversity context as the test for determining the validity of federal rules under the Rules Enabling Act. See *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 747-753 (1980); *Hanna* v. *Plumer*, 380 U.S. 460, 469-474 (1965); Ely, *supra*, 87 Harv. L. Rev. at 718-738. In its place, the Court has held that where there is a "direct collision" between a federal rule and state law, the test is "whether the Rule [is] within the scope of the Rules Enabling Act * * *, and if so, within a constitutional grant of power." *Walker*, 446 U.S. at 748; *Hanna*, 380 U.S. at 470-472. As the Court explained in *Sibbach*, 312 U.S. at 14, whether a rule is within the scope of the Rules Enabling Act depends upon:

> whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

So long as a federal rule *does* regulate procedure, it is valid, whether or not it affects substantive rights. See *Hanna*, 380 U.S. at 464-474; *Murphree*, 326 U.S. at 445-446; *Sibbach*, 312 U.S. at 14. Thus, analysis premised upon the distinction between substance and procedure has been abandoned for a test that focuses on procedure alone. That test does not even remotely resemble the test under *Erie* or *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945) (outcome-determinativeness test for substance/procedure) (cited by the court below at Pet. App. A9). So long as a rule governs "practice and procedure" (28 U.S.C. 2072), it is valid. See also *Hanna*, 380 U.S. at 476 (Harlan, J., concurring) (labeling the new approach the "arguably procedural" test).

This test results from the interaction between the constitutional policies of federal supremacy and federalism. In *Hanna*, 380 U.S. at 471-472 (footnote omitted), the Court explained:

> that this approach is inapplicable when, as in the instant case, suit is brought under federal law. The federalism concerns that animated the diversity cases and gave rise to the elusive substance/procedure dichotomy no longer exist when a federal rule is challenged because it "abridge[s], enlarge[s] or modif[ies]" a *federally* created "substantive right." Instead, in the federal question context, the phrase "substantive right" in Section 2072 refers to the allocation of authority between Congress and the Court.[19]

> We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in * * * the Constitution; in such areas state law must govern because there can be no other law. But the opinion in *Erie* * * * involved no Federal Rule and dealt with a question which was "substantive" in every traditional sense * * *. [T]he constitutional provision for a federal court system * * * carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

The foregoing analysis has no logical applicability when the conflict is not between state law and a federal rule, but between *federal* law and a federal rule. Such conflicts raise questions of congressional delegation and statutory construction. Thus, the United States does not ask this Court to uphold the application of Rule 68 in this case under the test of *Hanna* and *Walker*. We note, however, that under that test, it is obvious that the court of appeals erred in not applying Rule 68 to bar recovery of respondent's post-offer attorneys' fees. Clearly, Rule 68 "really regulates procedure" within the meaning of Section 2072. See page 27 note 21, *infra*. Under the diversity cases discussed above, the reference to "substantive right[s]" in Section 2072 is inapplicable where this is the case. See *Hanna*, 380 U.S. at 472; *Sibbach*, 312 U.S. at 14; Ely, *supra*, 87 Harv. L. Rev. at 718-720.

[19] The legislative history of the Rules Enabling Act supports this construction of Section 2072. Although the debates and legislative reports pertaining to the statute as finally enacted are sparse and

Because, when it promulgates rules pursuant to Section 2072, the Court exercises power delegated to it by Congress, a two-step inquiry is called for in judging a rule's validity. First, does the Constitution permit Congress to delegate to the Court authority to enact the particular rule? Second, if the answer is affirmative, has Congress in fact delegated the necessary authority? The second step is one of statutory construction [20] and

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uninformative, see Burbank, *The Rules Enabling Act*, 130 U. Pa. L. Rev. 1015, 1096-1097 (1982); see also S. Rep. 1049, 73d Cong., 2d Sess. (1934); H.R. Rep. 1829, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 9363, 10866 (1934), the Rules Enabling Act was originally proposed, in virtually identical form, in 1926, and again in 1928. See S. 477, 69th Cong., 1st Sess. (1926); S. 759, 70th Cong., 1st Sess. (1928). The legislative materials from these earlier attempts clearly reveal that Congress, in referring to "substantive right[s]," sought only to make clear its intention in the delegation to the Court contained in the Act's first sentence: that the Rules Enabling Act vested in the Court as much authority to make rules as the Constitution permits, but no more. See S. Rep. 1174, 69th Cong., 1st Sess. 9-16 (1926) (report accompanying S. 477); S. Rep. 440 (Pt. 2), 70th Cong., 1st Sess. 16-17 (1928) (report accompanying S. 759). For an exhaustive consideration of this generally ignored, pre-1934 legislative history, see Burbank, *supra*, 130 U. Pa. L. Rev. at 1035-1113.

That Congress was concerned with the limits of its power to delegate authority rather than with protecting state law from federal encroachment is not surprising. In 1934, *Erie* was four years away, and in the 1920's, when most of the Rules Enabling Act debate took place, *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), was in full bloom. The question of congressional authority to delegate responsibility to other branches of government, on the other hand, was extremely controversial. See, *e.g.*, R. Jackson, *The Struggle for Judicial Supremacy* (1941).

[20] This Court has never decided a case concerning the meaning of the Rules Enabling Act in a nondiversity context. Lower courts that have construed Section 2072 in federal question cases, however, have uniformly treated the issue as one of statutory construction. See *Brennan* v. *Silvergate District Lodge No. 50*, 503 F.2d 800, 804-805 (9th Cir. 1974); *United States* v. *Gustin-Bacon Division*, 426 F.2d 539, 542-543 (10th Cir.), cert. denied, 400 U.S. 832 (1970); 7 (Pt. 2) J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice* ¶ 86.04[4] (2d ed. 1984).

requires both that the rule be within the terms of the Rules Enabling Act and that Congress not have exercised its unquestioned authority, see *Sibbach*, 312 U.S. at 14-15; *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825); *United States* v. *Gustin-Bacon Division*, 426 F.2d 539, 542 (10th Cir.), cert. denied, 400 U.S. 832 (1970), to overrule the Court.

Neither the parties to this lawsuit nor the court below have questioned the constitutionality of Rule 68 as an exercise of delegated authority pursuant to Section 2072, even when attorneys' fees are placed within the larger set of "costs." [21] Moreover, as we have argued above, Rule 68 was approved by Congress with the understanding that it would incorporate the definition of costs contained in the statute underlying the motion for attorneys' fees. See pages 9-10 & note 4, *supra*. The only remaining question, therefore, is whether, in enacting Section 1988, Congress intended an implied, partial repeal of Rule 68 in civil rights cases.

The Federal Rules of Civil Procedure have the force of statutes. *Sibbach*, 312 U.S. at 13; 7 (Pt. 2) J. Moore,

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[21] There is no question that Rule 68 is, in fact, constitutional. Congress may delegate to the Court authority "to regulate the practice of the court and to facilitate the transaction of its business." *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635 (1924). This is so even though the delegation is of powers "which the legislature may rightfully exercise itself." *Wayman*, 23 U.S. (10 Wheat.) at 19. The allocation of costs and attorneys' fees is a tool that affects the judicial process, not the underlying sources of substantive rights upon which the parties base their claims. *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. at 451-452 (attorneys' fee awards are "not compensation for the injury giving rise to an action" and are "uniquely separable from the cause of action to be proved at trial"); see also *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 66 (1980); *Hutto* v. *Finney*, 437 U.S. at 691, 695 n.24; *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 170 (1939). Consequently, cost and fee-shifting rules govern the practice and procedure of courts and are within the power of Congress under the Constitution to delegate to the Court. See also *Alyeska*, 421 U.S. at 262 (Congress may authorize fee-shifting at discretion of courts).

J. Lucas & K. Sinclair, *Moore's Federal Practice* ¶ 69.04 (2d ed. 1984). A strong presumption exists in favor of the Rules' validity. *Hanna*, 380 U.S. at 471, 473; *H.F.G. Co.* v. *Pioneer Pub. Co.*, 162 F.2d 536, 539 (7th Cir. 1947); *Helms* v. *Richmond Petersburg Turnpike Auth.*, 52 F.R.D. 530, 531 (E.D. Va. 1971); 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4508, at 133 (1982). Repugnancy of a later-enacted statute to a federal rule is not to be lightly inferred. *Weiss* v. *Temporary Investment Fund, Inc.*, 692 F.2d 928, 936 (3d Cir. 1982); see also *Gustin-Bacon Division*, 426 F.2d at 542; 7 (Pt. 2) *Moore's Federal Practice*, *supra*, ¶ 86.04[4] ("[A] subsequently enacted statute should be so construed as to harmonize with the Federal Rules if that is at all feasible."). Rather, absent "the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure," *Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979), a federal statute is assumed not to alter the operation of the Federal Rules of Civil Procedure. See also *Weiss*, 692 F.2d at 936 ("abrogation" of a rule is "inappropriate" absent a "clear expression of congressional intent"); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1134-1135 n.50 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1980) ("Congressional intent to repeal a federal rule must be clearly expressed before the courts will find such a repeal."); *Brennan*, 503 F.2d at 804-805; *Gustin-Bacon Division*, 426 F.2d at 542.

The court of appeals did not find any "clear expression of congressional intent" to exempt fee applications filed under Section 1988 from the normal operation of Rule 68. The lower court merely *inferred* such an intention from the policy behind Section 1988 "to encourage the bringing of meritorious civil rights actions" and to further "compliance with the civil rights laws" (Pet. App. A8, A9). Implied repeals are strongly disfavored,

however, and are found only when two acts are in irreconcilable conflict or when a later act covers the whole subject of an earlier one and is clearly intended as a substitute; and, even then, "'the intention of the legislature to repeal must be clear and manifest . . . .'" *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982) (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976)); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 787-788 (1981) (citing cases). This policy against implied repeals applies *a fortiori* in considering the effect of Section 1988 on Rule 68 in light of the strong presumption in favor of the validity of the Federal Rules. The court of appeals thus clearly erred in holding that the Rules Enabling Act presents any obstacle to the normal operation of Rule 68 in the circumstances of this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

This appendix lists all the federal attorneys' fee statutes currently in force that our research has disclosed. The statutes are broken down into two large groups: those that award attorneys' fees as costs and those that do not. Within each of these two groups, the statutes are broken down further according to the verbal formulation used by Congress. Within each of these groups, the statutes are broken down yet again by year of enactment: those enacted contemporaneously or prior to the promulgation of Fed. R. Civ. P. 68 are set apart from more recent enactments. Statutes are listed by popular name and by location in the United States Code.

The appendix reveals that Congress favors awarding attorneys' fees as costs. Ninety-one of the 141 statutes we have found award fees as part of the costs of litigation. Of the statutes currently in force that were enacted prior to 1938, 19 of 25 award fees as costs. It should be noted that these figures do not include statutes that have been repealed and are no longer found in the United States Code.

I. STATUTES AWARDING ATTORNEYS' FEES AS PART OF THE COSTS

Statutory formula— "Attorney's fees as part of the costs"

Enacted prior to 1938

Copyright Act of 1909, 17 U.S.C. 40 (now codified at 17 U.S.C. 505)

Enacted subsequent to 1938

Agricultural Fair Practices Act of 1967, 7 U.S.C. 2305(a) and (c)

Education Amendments of 1972, 20 U.S.C. (1976 ed.) 1617

Jury System Improvements Act of 1978, 28 U.S.C. 1875(d)(2)
Rehabilitation Act of 1973, 29 U.S.C. 794a(b)
Voting Rights Act of 1965, 42 U.S.C. 1973*l*(e) (as amended in 1975)
The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. (Supp. V) 1988
Civil Rights of Institutionalized Persons Act, 42 U.S.C. (Supp. V) 1997c(d)
Civil Rights Act of 1964, Tit. II, 42 U.S.C. 2000a-3(b)
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e-5(k)

Statutory formula—
"Attorneys' fees to be taxed and collected as part of the costs"

Enacted prior to 1938

Packers and Stockyards Act of 1921, 7 U.S.C. 210(f)
Perishable Agricultural Commodities Act of 1930, 7 U.S.C. 499g(b) (as amended in 1937)
Railway Labor Act of 1926, 45 U.S.C. 153
Shipping Act of 1916, 46 U.S.C. 829
Communications Act of 1934, 47 U.S.C. 206
Communications Act of 1934, 47 U.S.C. 407
Interstate Commerce Act, 1887, 49 U.S.C. 8
Interstate Commerce Act, 1887, 49 U.S.C. 16
Interstate Commerce Act, 1887, 49 U.S.C. 908(b) and (e)

Enacted subsequent to 1938

Act of Oct. 17, 1978, 49 U.S.C. (Supp. V) 11705(d)(3)
Act of Oct. 17, 1978, 49 U.S.C. (Supp. V) 11710(b)

Statutory formula—
"Costs(including attorneys' fees)"

Enacted Prior to 1938

Perishable Agricultural Commodities Act of 1930, 7 U.S.C. 499f(e)
Clayton Antitrust Act, 15 U.S.C. 15
Unfair Competition Act, 1916, 15 U.S.C. 72
Securities Act of 1933, 15 U.S.C. 77k(e)
Securities Exchange Act of 1934, 15 U.S.C. 78i(e)
Securities Exchange Act of 1934, 15 U.S.C. 78r(a)
Indian General Allotment Act, 1887, 25 U.S.C. 331
Merchant Marine Act of 1936, 46 U.S.C. 1227

Enacted subsequent to 1938

Ethics in Government Act of 1978, 2 U.S.C. 288i(d)
Commodity Exchange Act, 7 U.S.C. 18(c), (d) and (e) (added in 1983)
Home Owners' Loan Act of 1933, 12 U.S.C. 1464(q)(3) (added in 1982)
Bank Holding Company Act Amendments of 1970, 12 U.S.C. 1975
Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 15c(a)(2)
Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 26
Trust Indenture Act, 1939, 15 U.S.C. 77ooo(e)
Trust Indenture Act, 1939, 15 U.S.C. 77www(a)
Act of July 31, 1970, 15 U.S.C. 298(b), (c) and (d)
Consumer Product Safety Act, 15 U.S.C. 2060(c)
Consumer Product Safety Act, 15 U.S.C. 2072(a) and (b)
Consumer Product Safety Act, 15 U.S.C. 2073
Hobby Protection Act, 15 U.S.C. 2102
Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2310(d)

Toxic Substances Control Act, 15 U.S.C. 2622(b)(2)(B)
Export Trading Company Act of 1982, 15 U.S.C. 4016(b)
Endangered Species Act of 1973, 16 U.S.C. 1540(g)(4)
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c)
Act of Oct. 1, 1965, 25 U.S.C. 565c
Act of Oct. 1, 1965, 25 U.S.C. 565d
Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1451(e)
Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1427(c)
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3)
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(b)
Federal Mine Safety and Health Act of 1977, 30 U.S.C. 938(c)
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1270(d)
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1275(c)
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1293(c)
Federal Water Pollution Control Act, 33 U.S.C. 1367(c)
Federal Water Pollution Control Act, 33 U.S.C. 1365(d)
Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1415(g)(4)
Act to Prevent Pollution from Ships, 33 U.S.C. 1910(d)
Safe Drinking Water Act, 42 U.S.C. 300j-9(i)(2)(B)(ii)
Safe Drinking Water Act, 42 U.S.C. 300j-8(d)

Civil Rights Act of 1964, Tit. III, 42 U.S.C. 2000b-1
Noise Control Act of 1972, 42 U.S.C. 4911(d)
Act of Nov. 6, 1978, 42 U.S.C. (Supp. V) 5851(e)(2)
Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. (Supp. V) 6104(e)(1)
Energy Policy and Conservation Act, 42 U.S.C. 6305(d)
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6971(c)
Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. V) 6972(e)
Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) 7413(b)
Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) 7604(d)
Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. V) 7622(b)(2)(B)
Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. V) 8435(d)
Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. (Supp. V) 9610(c)
Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp. V) 1349(a)(5)
Rail Transportation Improvement Act, 45 U.S.C. 854(g)
Act of Sept. 14, 1973, 47 U.S.C. (Supp. V 1975) 331(b) (repealed in 1975)
Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. (Supp. V) 2014(e)

Statutory formula—
"Attorneys' fees and other litigation costs"

Enacted prior to 1938

None

Enacted Subsequent to 1938

Freedom of Information Act, 5 U.S.C. 552(a)(4)(E) and (F)
Privacy Act of 1974, 5 U.S.C. 552a(g)(2)(B), (3)(B)
Government in the Sunshine Act, 5 U.S.C. 552b(i)
Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 57a(h)(1)
Toxic Substances Control Act, 15 U.S.C. 2605(c)(4)(A)
National Historic Preservation Act Amendments of 1980, 16 U.S.C. 470w-4
Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 825q-1(b)(2)
Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2520
Act of Sept. 21, 1968, 25 U.S.C. 788f
Privacy Protection Act of 1980, 42 U.S.C. (Supp. V) 2000aa-6(f)
Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1810(c)

Statutory formula—
"Costs other than attorneys' fees"

Enacted Prior to 1938

Act of May 18, 1928, 25 U.S.C. 655

Enacted Subsequent to 1938

None

II. STATUTES AWARDING ATTORNEYS' FEES AND COSTS AS SEPARATE ITEMS

Statutory formula—
"Costs and a reasonable attorney's fee" or
"costs together with a reasonable attorney's fee"

Enacted prior to 1938

Norris-La Guardia Act, 29 U.S.C. 107
Fair Labor Standards Act of 1938, 29 U.S.C. 216
Interstate Commerce Act, 49 U.S.C. 322(b)
Interstate Commerce Act, 49 U.S.C. 1017(b)

Enacted Subsequent to 1938

Act of Sept. 6, 1966, 5 U.S.C. 8132
Federal Crop Insurance Act, 7 U.S.C. 1507(c) (added in 1980)
Housing Act of 1959, 12 U.S.C. 1715u(b)(1)
Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2607(d)(2)
Right to Financial Privacy Act of 1978, 12 U.S.C. 3417(a)(4)
Right to Financial Privacy Act of 1978, 12 U.S.C. 3418
Securities Exchange Act of 1934, 15 U.S.C. 78u(h) (added in 1980)
National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1400(a)
Consumer Credit Protection Act, 15 U.S.C. 1681n(3)
Consumer Credit Protection Act, 15 U.S.C. 1681o(2)
Consumer Credit Protection Act, 15 U.S.C. 1691e(d)
Consumer Credit Protection Act, 15 U.S.C. 1692k(a)
Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1918(a)

Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1989(a) (2)
Alaska National Interest Lands Conservation Act, 16 U.S.C. 3117(a)
Welfare and Pension Plans Disclosure Act, 29 U.S.C. (1970 ed.) 308(c)
Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 431(c)
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(g)(1)
Multiple Mineral Development Act, 30 U.S.C. 526 (e)
Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. (Supp. V) 9612(c)
National Mobile Home Construction and Safety Standards Act of 1974, 42 U.S.C. (& Supp. V) 5412(b)
Alaska National Interest Lands Conservation Act, 43 U.S.C. (Supp. V) 1631(c)
Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1810(c)

Statutory formula—
Statutes listing costs and attorneys' fees separately

Enacted Prior to 1938

Act of Feb. 26, 1853, 28 U.S.C. 1927
Act of Mar. 3, 1887, 48 U.S.C. 1506 (added in 1897)

Enacted Subsequent to 1938

Bankruptcy Act of 1978, 11 U.S.C. 303(i)
Bankruptcy Act of 1978, 11 U.S.C. 363(n)
Bankruptcy Act of 1978, 11 U.S.C. 523(d)
Housing Act of 1961, 12 U.S.C. 1715k(h)(6)
Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1709(c)

Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. 3608(d)
Condominium and Cooperative Abuse Relief Act of 1980, 15 U.S.C. 3611(d)
Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2632(a) and (b)
Act of Dec. 22, 1974, 25 U.S.C. 640d-27(a) and (b)
Act of Oct. 14, 1966, 25 U.S.C. 1102
Act of Oct. 14, 1966, 25 U.S.C. 1132
Act of Oct. 24, 1967, 25 U.S.C. 1152
Act of Sept. 21, 1968, 25 U.S.C. 1183
Act of Mar. 18, 1972, 25 U.S.C. 1261
Act of Oct. 6, 1972, 25 U.S.C. 1300
Act of Oct. 25, 1972, 25 U.S.C. 1300d
Tax Reduction and Simplification Act of 1977, 42 U.S.C. (Supp. V) 662(b)
Atomic Energy Act of 1954, 42 U.S.C. 2184
Fair Housing Act of 1968, 42 U.S.C. 3612(c)
Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. (Supp. V) 1818(c)(1)(C)
Act of Oct. 17, 1978, 49 U.S.C. (Supp. V) 11708(c)

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